IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 872 OF 2001

1. Mr.Kailas Shankar Thakar,
2. Smt.Parvatabai Shankar Thakar,
   both Adults, residents of
   Kolgaonmal, Taluka Sinnar,
   District Nashik. ... Appellants.

Versus.

1. Shri Shripat Kisan Thakar
   (since deceased through legal
   representatives)
   A. Mrs.Meerabai Ramnath More,
      Adult, Occ.: Household,
      R/o. Kolgaonmal, Taluka:
      Sinnar, Dist. Nashik.
2. Mr.Ashok Shripat Thakar,
3. Mr.Yuvraj Shripat Thakar,
4. Mr.Uttam Shripat Thakar,
5. Mrs.Sarubai Uttam Thakar,
   Adults, Occ.: Agriculture,
   R/o.Kolgaonmal, Taluka:
   Sinnar, Dist. Nashik. ... Respondents.

Shri P.N.Joshi for the Appellants.

Shri T.S.Ingale for the Respondents.

CORAM : ABHAY S.OKA, J.

DATED : 29th/30th March 2007.

ORAL JUDGMENT.

1. Submissions of the learned Advocates appearing for the parties were heard on the last date. On the last date substantial questions of law were framed in view of the decision of the Apex Court in the case of

Narayanan v/s. Kumaran & others [(2004) 4 S.C.C. page 26]. Though the Advocates appearing for the parties had made submissions on 16th March 2007, today the Appeal was kept for further hearing after the subsequential questions law were framed on that day. The learned Advocates for the parties fairly stated today that they have made detailed submissions on the last date and they do not want to make any further submissions.

2. The Appellants are the original Plaintiffs and the Respondents are the original Defendants. The Appellants filed a suit for declaration and perpetual injunction and in the alternative for possession. The Appellant No.1 at the time of the institution of the suit was a minor. The Appellant No.2 is the mother of Appellant No.1. According to the case of the Appellants, the suit property is an ancestral property in the hands of Shankar who is the deceased husband of the 2nd Appellant. The said Shankar expired in the year 1968. According to the case of the Appellants, the Respondents herein are not the members of the family of the deceased Shankar and they have no concern with the suit property. It is alleged by the Appellants that Jawar crop was taken in the year 1985 by the Appellants. When the said crop was sought to be harvested, the Respondents prevented the second Appellant from getting

the crop. At that time the second Appellant made enquiries with the village Talathi and she learnt that the 5th Respondent had entered his name in the record of rights in respect of the suit property. She learnt that the name of the 5th Respondent was mutated on the basis of a deed of adoption allegedly executed in favour of the 5th Respondent. According to the case of the Appellants, the 2nd Appellant never executed any deed of adoption in favour of the 5th Respondent. According to the 2nd Appellant there was no necessity for her to adopt the 5th Respondent as she already has a son (the 1st Appellant). According to the case of the 2nd Appellant, her signature on the deed of adoption was obtained by fraud and the said document was void ab-initio.

3. The 3rd Respondent filed a written statement which was adopted by the other Respondents. The case of the Respondents is that the suit property was always in possession of the 5th Respondent on the basis of the deed of adoption. It is contended that the deed of adoption is legal and valid.

4. The learned trial Judge decreed the suit filed by the Appellants by declaring that the alleged deed of adoption was not legal and valid and the same cannot be

acted upon. A perpetual injunction was granted against the Respondents restraining them from interfering with the lawful and peaceful possession of the Appellants over the suit property. The Respondents herein preferred an Appeal before the District Court. By the impugned Judgment and order dated 22nd December 2000, the learned 2nd Additional District Judge, Nashik partly allowed the Appeal by setting aside the decree and by remanding the suit to the trial Court. The learned Additional District Judge observed in the judgment that three additional issues were required to be framed, namely: (i) whether the 5th Defendant was the adopted son of the 2nd Plaintiff; (ii) whether the deed of adoption dated 30th September 1977 was valid and legal; and (iii) who is in actual physical possession of the suit property on the date of institution of the suit. The learned Judge also observed that 4th issue will have to be framed to the effect whether the Plaintiffs prove that under misrepresentation 2nd Appellant's thumb impression was taken on a stamp paper by playing fraud upon her. The last issue suggested by the learned Judge was whether the 1st Appellant was the son of the deceased Shankar and was entitled to inherit the property of the deceased Shankar. The learned Judge permitted both the parties to adduce evidence before the Trial Court.

5. The learned Advocate for the Appellants submitted that no grievance was made at any stage by the Respondents as regards the failure of the trial Court to frame appropriate issues. The learned Counsel further submitted that both the parties knew that the issue regarding legality and validity of the adoption deed and the issue regarding the status of the 1st Respondent was very much involved in the suit and in fact the parties have led evidence on the said two issues and also on the dispute relating to possession of the property on the date of institution of the suit. He submitted that when the parties have led evidence on all the relevant issues, there was no prejudice to the Respondents if the issues regarding the legality and validity of the deed of adoption and the status of the 1st Appellant were not framed. He invited my attention to the findings recorded by the learned trial Court and submitted that on all the issues which are directed to be framed under the impugned order, the parties have led evidence and the trial Court has recorded findings. He, therefore, submitted that the order of remand was totally uncalled for.

6. The learned Advocate for the Respondents supported the impugned Judgment and order. He submitted

that the trial Court has granted a declaration that the adoption deed is not legal and proper without framing an issue on the legality and validity of the adoption deed. He submitted that even as regards the status of the 1st Appellant, there is no specific issue framed by the trial Court. He submitted that a reasoned order has been passed by the Appellate Court. He, therefore, submitted that no interference is called for.

7. I have considered the submissions. The trial Court framed the following issues:

(1) Are plaintiff entitled for permanent injunction against the Defendants ?

(2) Do plaintiffs prove the obstruction by the Defendants ?

(3) Does the Plaintiff prove that he is entitled for relief of declaration, permanent injunction alternatively for relief of possession ?

The parties led oral and documentary evidence. The Appellants examined the 2nd Appellant and two witnesses. The Respondents also examined two witnesses. In

paragraph 8 of the Judgment, the trial Court has discussed issue No.3. The trial Court has referred to the evidence led by the 2nd Appellant to show that she was the legally wedded wife of the deceased Shankar and that the 1st Appellant is the son born from the said Shankar. The witness Laxman Tukaram has been examined in support of the contention that the 1st Appellant is the son of the 2nd Appellant. In paragraph 10 the judgment the learned trial Judge has stated that the Respondents had examined Respondent No.5 and the attesting witness to the deed of adoption for the purpose of proving the deed of adoption. The trial Court has also referred to the fact that both the witnesses examined by the Respondents had deposed that the 1st Appellant was not the son of the 2nd Appellant and as the 2nd Appellant was not having any son, she adopted the 5th Respondent. The learned trial Judge has discussed the relevant legal provisions as regards the adoption. In paragraph 13 of the Judgment, the learned Judge has discussed in detail the evidence led before the Court by the Appellants in support of the contention that the 2nd Appellant is the mother of the 1st Appellant. A perusal of the Judgment of the trial Court shows that the parties have led evidence on the issue whether the 1st Appellant was the son of the 2nd Appellant and whether the deed of adoption dated 30th

September 1977 was legal and valid. A perusal of the judgment of the trial Court also shows that the parties have led evidence on the question as to who was in possession of the suit land on the date of institution of the suit and that the said question is also answered by the learned trial Judge.

8. The learned Additional District Judge in paragraph 5 of the Judgment has elaborately recorded the submissions made by the Advocate for the Respondents before him. He has summarised the submissions made by the Advocate for the Respondents in three different paragraphs. Hence, I find that there is no specific grievance made regarding the failure to frame proper issues, save and except the issue regarding adoption of Respondent No.5.

9. In the case of Nedunuri Kameswaramma v/s. Sampati Subba Rao (AIR 1963 SC 884), the Apex Court held that the omission to frame issues cannot be fatal in a case where the parties went to the trial fully knowing the rival case and led all the eidence not only in support of their contention but in refutation of those of the other side. The Apex Court held that in such a case the suit cannot be dismissed on the ground of failure to frame issues and there is no need to remand

the suit as evidence which has been led in the case is sufficient to reach the right conclusion. In the case of Shaikh Ibrahim v/s. Shaikh Mohamood (AIR 2003 Bombay 357) the learned Single Judge of this Court held that when the parties were fully aware of their respective cases and have led evidence on all the issues comprised in the suit, the order of remand passed by the Appellate Court was not proper.

10. A perusal of the Judgment of the trial Court shows that both the parties were fully conscious of the issue regarding the status of the 1st Appellant, the issue regarding the validity of deed of adoption dated 30th September 1977 and the issue regarding the physical possession of the suit property on the date of institution of the suit, and both the parties have led evidence on these aspects. The Appellate Court has observed that as issues on the aforesaid questions were not framed, it is necessary to remand the suit to the trial Court. In the present case, there could not have been an order of remand only on the ground that the aforesaid issues were not framed. In the present case the trial is not vitiated on the ground of non-framing of issues as parties have led evidence on all the issues.

11. In view of the settled position of law, the order of remand in the facts and circumstances of the case was uncalled for and illegal. Therefore, the order of remand deserves to be quashed and set aside. I have already observed that there is sufficient evidence on record to decide the controversy involved in the suit. As the first Appellate Court has not adverted to the evidence on record and has not recorded any findings on merits, the impugned judgment and order of the Appellate Court will have to be set aside and the Appeal will have to be remanded back to the Appellate Court for a fresh hearing.

12. Hence the following order is passed:

(i) The impugned Judgment and order dated 22nd December 2000 is quashed and set aside and the Civil Appeal No.137 of 1999 is restored to the file of the District Court at Nashik.

(ii) The District Court will now hear and decide the said appeal afresh in the light of the observations made in this Judgment. Since the Appeal is of the year 1997, the same shall be heard and decided

expeditiously and preferably on or before 31st December 2007.

(iii) If any interim relief was operating during the pendency of Civil Appeal No.137 of 1997, the same will continue to operate till final disposal of the Appeal.

(iv) All contentions of the parties on merits are expressly kept open.

(v) The parties and the concerned Court will act on an authenticated copy of this order.

(vi) The Appeal is partly allowed in the above terms with no order as to costs.

(vii) The writ to be forwarded to the District Court on or before 4th June 2007.

Judge.